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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT E. CHARBONNEAU,
Plaintiff,

Civil No. 07-1599-AA
OPINION AND ORDER

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

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AIKEN, Judge:

Claimant, Robert Charbonneau, brings this action pursuant
to the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying his application for disability insurance
3 benefits under Title II of the Act. For the reasons set forth
4 below, the Commissioner's decision is affirmed and this case is
5 dismissed.

6 **PROCEDURAL BACKGROUND**

7 On January 2, 2004, plaintiff filed an application for
8 disability insurance benefits. Tr. 12, 53-56. The application
9 was denied initially, tr. 42-47, and on reconsideration. Tr. 50-
10 52. An administrative law judge (ALJ) held a hearing on April 2,
11 2007. Tr. 457-490. On June 22, 2007, the ALJ issued a decision
12 finding plaintiff not disabled because he could perform other
13 work existing in significant numbers in the national economy.
14 The ALJ found plaintiff could work as a food preparation worker,
15 an ejection molding machine operator, and a cashier. Tr. 9-22.
16 On August 24, 2007, the Appeals Council denied plaintiff's
17 request for review, making the ALJ's decision the Commissioner's
18 final decision. Tr. 4-6. See 20 C.F.R. §§ 404.981, 422.210.

19 **STATEMENT OF THE FACTS**

20 At the time of the April 2, 2007, hearing, plaintiff was 49
21 years old and had a high school education. Tr. 53, 71.
22 Plaintiff had past relevant work experience as a carpenter and a
23 roofer. Tr. 66, 92, 484. Plaintiff alleged disability beginning
24 on September 28, 1999, due to "3 level fusion to neck, chronic
25 pain in head and neck, disc prolapse and cervical spondylosis at
26 c3-4, c4-c5, c5-c6." Tr. 53, 65.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant

1 has a "medically severe impairment or combination of
2 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
3 §§ 404.1520(c), 416.920(c). If not, the claimant is not
4 disabled.

5 In step three the Secretary determines whether the
6 impairment meets or equals "one of a number of listed impairments
7 that the Secretary acknowledges are so severe as to preclude
8 substantial gainful activity." Id.; see 20 C.F.R.
9 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
10 presumed disabled; if not, the Secretary proceeds to step four.
11 Yuckert, 482 U.S. at 141.

12 In step four the Secretary determines whether the claimant
13 can still perform "past relevant work." 20 C.F.R.
14 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
15 disabled. If she cannot perform past relevant work, the burden
16 shifts to the Secretary. In step five, the Secretary must
17 establish that the claimant can perform other work. Yuckert, 482
18 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
19 (f). If the Secretary meets this burden and proves that the
20 claimant is able to perform other work which exists in the
21 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
22 416.966.

23 DISCUSSION

24 1. The ALJ's Findings

25 At step one, the ALJ found that plaintiff did not engage in
26 substantial gainful activity during the period from his alleged
27 onset date of September 28, 1999, through December 31, 2004. Tr.
28 14, Finding 2. See 20 C.F.R. § 404.1520(b). At step two, the

1 ALJ found that plaintiff had the following severe impairments:
2 cervical disc disease status post microdiscectomy, alcohol abuse
3 and cannabis abuse. Tr. 14, Finding 3. The ALJ also found at
4 step two that plaintiff's depression and pain disorder were not
5 severe impairments. Tr. 14. See 20 C.F.R. § 404.1520(c).

6 At step three, the ALJ found that plaintiff did not have an
7 impairment or combination of impairments that met or equaled any
8 of the impairments in the Listings. Tr. 15, Finding 4. See 20
9 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d). In determining
10 plaintiff's residual functional capacity, the ALJ found that:

11 [t]hrough the date last insured, the claimant had the
12 residual functional capacity to lift 20 pounds
13 occasionally and 10 pounds frequently. He can stand
14 and walk 6 hours out of an 8-hour day and sit 6 hours
15 out of an 8-hour day. He cannot climb ladders,
16 ropes or scaffolds. He cannot kneel, crouch, or
17 crawl. He can frequently climb ramps and stairs,
18 balance and stoop. He is limited to occasional
19 overhead reaching and should limit shoulder level
20 bilateral use of the upper extremities[.]

21 Tr. 15, Finding 5. See 20 C.F.R. §§ 404.1520(e), 404.1545.

22 At step four, the ALJ found that plaintiff was unable to
23 perform his past relevant work. Tr. 20, Finding 6. See 20
24 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f). Finally, at step
25 five, the ALJ found that plaintiff could perform other work
26 existing in significant numbers in the national economy. The ALJ
27 found plaintiff could work as a food preparation worker, an
28 ejection molding machine operator, and as a cashier. Tr. 21,
Finding 10. See 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1450(g).

2. Plaintiff's Allegations of Error

The defendant concedes plaintiff's first two allegations of
error. Those are: the ALJ failed to include the limitation that

1 plaintiff should "limit above shoulder level bilateral use of his
2 upper extremities" in the hypothetical question to the vocational
3 expert (VE); and the ALJ failed to include the limitation that
4 plaintiff was capable of only "occasional use of the upper
5 extremities at shoulder and overhead levels" in his residual
6 functional capacity finding and in the hypothetical question to
7 the VE. The defendant argues, however, that any error was
8 harmless. See Parra v. Astrue, 481 F.3d 742, 747 (9th Cir. 2007).
9 The three jobs identified for the plaintiff by the VE do not
10 indicate that "above shoulder level bilateral use of the upper
11 extremities," or "use of the upper extremities at shoulder and
12 overhead levels," are required to perform the job. See
13 Dictionary of Occupational Title's (DOT) description or
14 introductory paragraph of each job: DOT 316.684-014 (food
15 preparation worker)¹, DOT 556.685.038 (ejection molding machine
16 operator), and DOT 211.462-010 (cashier). Therefore, based on
17 the job descriptions found in DOT for each of the jobs identified
18 by the VE, there is no indication that those jobs require tasks
19 involving above shoulder level bilateral use of the upper
20 extremities or use of the upper extremities at shoulder and
21 overhead levels.

22 Plaintiff next asserts that the ALJ erred in determining
23 his residual functional capacity (RFC) because the ALJ rejected
24 his subjective testimony without evaluation, and because the ALJ
25 failed to consider the combined effect of all of his impairments.
26 Pl's Brief, p. 10-12, 14. First, I find that the ALJ properly

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28 ¹ DOT actually refers to this job number as a "deli cutter-
slicer, and not a "food preparation worker."

1 considered all of plaintiff's impairments when assessing
2 plaintiff's residual functional capacity. The ALJ specifically
3 noted that an individual's RFC is his ability to do physical and
4 mental work activities on a sustained basis despite limitations
5 from his impairments. Tr. 13. In making this finding, "the
6 undersigned must consider all of the claimant's impairments
7 including impairments that are not severe." Id. (internal
8 citations omitted). The court finds that the ALJ considered all
9 of plaintiff's limitations, severe and non-severe, in assessing
10 plaintiff's RFC.

11 Regarding plaintiff's complaint that the ALJ rejected his
12 subjective testimony without evaluation, I find this allegation
13 is without support. Once a claimant produces objective medical
14 evidence of an underlying impairment or combination of
15 impairments that could reasonably be expected to produce some
16 degree of pain or other symptoms and there is no affirmative
17 evidence suggesting the claimant is malingering, the ALJ may
18 reject claimant's testimony regarding the severity of the alleged
19 pain or other symptom by offering specific, clear and convincing
20 reasons for doing so. Smolen v. Chater, 80 F.3d 1273, 1281-84
21 (9th Cir. 1996).

22 The plaintiff testified that he was unable to work due to
23 neck pain, arm numbness, he was unable to sit and use a keyboard,
24 he needed to lie down during the day, he had weakness and
25 numbness in his hands and was having difficulty grasping. Tr.
26 462-63, 465-68, 472-74, 478. The ALJ found that plaintiff's
27 statements concerning the intensity, duration and limiting
28 effects of his symptoms were not entirely credible. Tr. 17. The

1 ALJ relied on the following evidence from the record to support
2 his finding that plaintiff's intensity and limiting effects of
3 his symptoms were not entirely credible: on September 27, 1999,
4 plaintiff was evaluated by Eric Sandefur, D.O., for his
5 complaints of neck pain. Tr. 139. Dr. Sandefur recommended that
6 plaintiff "continue to work doing his full duties," but he should
7 "try to avoid as much heavy lifting as possible." Tr. 140. In
8 March 2002, an evaluating physician, Dr. Fax, an orthopedic
9 surgeon, found that plaintiff did not have any restriction on the
10 number of consecutive hours he could sit, stand or walk. Tr.
11 159, 166. Dr. Fax further found that plaintiff was not
12 restricted from "working the same number of hours he worked prior
13 to his injury." Id. In April 2005, Dr. Hamby determined that
14 plaintiff was "medically stationary" regarding his industrial
15 injury. Tr. 346. He further determined that plaintiff was
16 capable of lifting 20 pounds floor to waist. Tr. 344. Further,
17 Dr. Hamby noted that plaintiff could frequently bend, twist,
18 kneel and walk on level surfaces. Tr. 345. Plaintiff was also
19 able to demonstrate frequent repetitive use of his wrists, hands,
20 and arms, with the exception of decreased tolerance for bilateral
21 upper extremity activity at shoulder and overhead levels, which
22 he could demonstrate occasionally. Id. In May 2005, Dr. Hamby
23 found that plaintiff was capable of working in the light work
24 category with limited above shoulder level use of the upper
25 extremities. Tr. 335.

26 In addition, the ALJ noted the objective findings during
27 plaintiff's independent medical evaluation in July 2003, tr. 276,
28 and a August 2004, multi-disciplinary pain evaluation. Tr. 365.

1 Medical evidence is a relevant factor in determining the severity
2 of plaintiff's pain and its disabling effects. Rollins v.
3 Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Finally, the ALJ
4 noted that in April 2003, his physician reported that he was
5 noncompliant with a rehabilitation and exercise program, and
6 noted generally plaintiff was a "noncompliant patient." Tr. 152.
7 The ALJ further noted that in October 2003, plaintiff's doctor
8 again stated that plaintiff failed to follow the advice of
9 physicians and physical therapists regarding an exercise
10 rehabilitation program. Tr. 149. The ALJ appropriately
11 considered plaintiff's failure to follow prescribed treatment in
12 the context of evaluating his subjective complaints. See Smolen
13 v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (in determining
14 whether claimant's testimony regarding the severity of his
15 symptoms is credible, the ALJ may consider unexplained or
16 inadequately explained failure to seek treatment or follow a
17 prescribed course of treatment).

18 Moreover, the ALJ noted that despite plaintiff's pain
19 complaints, he led an active lifestyle. Tr. 18. The ability "to
20 perform various household chores such as cooking, laundry,
21 washing dishes, and shopping" is a specific, clear and convincing
22 reason to discount testimony. Thomas v. Barnhart, 278 F.3d 947,
23 959 (9th Cir. 2002). In August 2001, plaintiff reported that he
24 was doing more around the house and was anxious to return home to
25 continue painting. Tr. 206. In September 2001, he reported that
26 he had been overdoing it over the past three days, stripping and
27 repainting a shed. Tr. 204. Plaintiff was able to function in
28 a 37-hour-a-week training program and testified that he ended up

1 leaving the program, not due to pain, but due to peer harassment.
2 Tr. 466-67, 478-79. In September 2004, plaintiff reported he had
3 been painting but had difficulty holding a paintbrush due to
4 thumb pain. Tr. 321. In December 2005, plaintiff reported that
5 he hoped that remodeling his house would be helpful with symptoms
6 as well as continued walking on the treadmill. Tr. 403. In
7 February 2006, plaintiff reported he was walking a couple of
8 miles a day. Tr. 397. In June 2006, plaintiff reported
9 increased activity including home repairs and working in the
10 yard. Tr. 387. In December 2006, plaintiff reported that his
11 three-year-old grandson stayed with him for up to a week at a
12 time. Tr. 397. In January 2007, plaintiff again reported that
13 he had been painting. Tr. 328.

14 The ALJ noted that plaintiff testified he was able to
15 engage in these activities for only brief periods. Tr. 18. The
16 ALJ concluded, however, that while plaintiff may be able to
17 perform remodeling type of activities for only brief periods,
18 there was no evidence that he was not able to sustain lighter
19 types of tasks over an extended period. Id. An ability to
20 perform daily activities may be seen as inconsistent with a
21 condition or impairment which would preclude all work activity.
22 Curry v. Sullivan, 925 F.2d 1127, 1130 n.1 (9th Cir.
23 1991)(internal citation omitted). Finally, the ALJ found
24 plaintiff's credibility further undermined due to his history of
25 alcoholism, and marijuana use. Tr. 18-19. In viewing the record
26 as a whole, I find the ALJ provided clear and convincing, and
27 specific reasons to reject plaintiff's subjective complaints as
28 not entirely credible. Tr. 15-19.

1 **CONCLUSION**

2 The Commissioner's decision is based on substantial
3 evidence, and is therefore, affirmed. This case is dismissed.
4 IT IS SO ORDERED.

5 Dated this 10 day of July 2008.

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10 Ann Aiken
11 United States District Judge
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